

Ayad (Migration) [2018] AATA 3702 (3 July 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Saed Ayad
VISA APPLICANT:	Ms Fatema AlKhalaf
CASE NUMBER:	1703798
DIBP REFERENCE(S):	2015055050 OSF2015/055050
MEMBER:	David Barker
DATE:	3 July 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations

Statement made on 03 July 2018 at 3:23pm

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – Whether a genuine spousal relationship exists – Limited evidence of joint finances and household responsibilities – Evidence of joint finances and household responsibilities limited by circumstances – Relationship acknowledged and supported by family and friends – Relationship viewed as continuous and ongoing – Seeking material benefit or advancement not necessarily accorded negative weight – Decision remitted with direction

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 309.211, 309.221

CASES

Re MILGEA and Dhillon [1990] FCA 144

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 5 February 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 27 October 2016 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309. 211 and 309.221 because they were not satisfied on the evidence that the parties were in a genuine and continuing spousal relationship.
4. The review applicant appeared before the Tribunal on 18 April 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant and the mother of the review applicant.
5. The review applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. BACKGROUND

8. The visa applicant is a Lebanese national and is 44 years old. She is the cousin of the review applicant and has declared no previous spouse or de facto relationships.
9. The review applicant was born in Australia is currently 45 years old. He was previously married from August 1998 to March 2014. There were three children from that union, aged 18, 9 and 6 years.
10. The parties claim they knew of each other as cousins and met in Lebanon, after the breakdown of the review applicant's previous marriage, on 1 June 2014, at a time the review applicant and his mother were visiting Lebanon following the death of the review applicant's father. The parties gave evidence they gave a commitment to a relationship together on 14 June 2014. The visa applicant then unsuccessfully applied for a subclass 300 prospective marriage visa.
11. The review applicant returned to Lebanon and the parties were married in September 2015.
12. In the delegate's decision record, a copy of which the review applicant provided to the Tribunal, the delegate expressed a range of concerns in relation to the visa application, including:
 - the parties gave inconsistent information about the review applicant's Centrelink income and why financial remittances sent to the visa applicant ceased being made in the review applicant's name;

- the parties gave inconsistent information about their household arrangements in Lebanon for the period following their marriage until the review applicant returned to Australia in November 2015;
- photographs provided with the visa application displayed only limited contexts and witness support statements were only provided by family members;
- evidence in support of the ongoing contact between the parties was not provided with the visa application;
- the visa applicant gave inconsistent information regarding the extent of language barriers in the parties' verbal communication.

13. At and prior to the hearings the review applicant provided documents to the Tribunal including, but not limited to:

- a written statement from the review applicant;
- a copy of the parties' marriage certificate;
- a copy of the review applicant's divorce order;
- medical evidence regarding the review applicant's health conditions;
- furniture receipts;
- jewellery receipts;
- travel records;
- Western union financial remittance records;
- witness support declarations;
- electronic communication records;
- telephone communication records.

14. Following the hearing the Tribunal gave the review applicant time to provide any further evidence and arguments he would like considered before a decision was made in this matter.

15. On 24 April 2018 the Tribunal received account statements from the review applicant's CBA account covering the April 2016 to April 2018 period.

CONSIDERATION OF CLAIMS AND EVIDENCE

16. The issue in the present case is whether the visa applicant and review applicant were, at the time of application and at the time of this decision in a genuine and continuing relationship.

17. [Information removed].

18. [Information removed].

Whether the parties are in a spouse or de facto relationship

19. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.

20. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

21. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship.
22. The Tribunal has reviewed the Certificate of Marriage from the Lebanese Republic Ministry of Interior and Municipalities General Directorate of Personal status which states the visa applicant and review applicant were married at Menyah / El Menyaeh Dennyeh in September 2015 and has formed the view it has no reason to doubt the authenticity of this document. The Tribunal has also reviewed the divorce order, dated 19 February 2014, pertaining to his previous marriage.
23. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

24. **Are the other requirements for a spousal relationship met?**

25. ***The financial aspects of the relationship***

26. The parties gave oral evidence during the hearing that they have no shared assets of any significance, nor joint liabilities or legal obligations to each other. As to the extent of any pooling of financial resources, especially in relation to major financial commitments, the review applicant said he has sent the visa applicant gold jewellery with an approximate value of \$1,500, in what was a culturally traditional bridal gift. In her oral evidence during the hearing the review applicant's mother indicated the value of jewellery gifted to the visa applicant is significantly higher than the figure estimated by the review applicant and the Tribunal has accepted her evidence due to her greater familiarity with the review applicant's day to day financial affairs.
27. As to the basis of any sharing of day to day household expenses, the review applicant said he sends the visa applicant money to assist her meet her regular living expenses. He said his mother assists him with these financial remittances as there was some problem he does not understand in relation to sending the funds to Lebanon in his own name.
28. The review applicant's mother gave evidence she has a large role in assisting the review applicant with the management of his day to day finances as he will otherwise be at risk of spending his money impulsively. She said she withdraws most of the review applicant's Centrelink payment within a day or so of it being deposited into his account. She said she puts some of his income aside as savings and uses some of his Centrelink money to pay for regular household expenses. She said she also remits some funds to the visa applicant on a fairly regular basis, which she said is evidenced by the remittance receipts provided with the visa and review applications. She said she used to remit the funds in her son's name, but that for some reason Western union stopped accepting this arrangement and since that time she has remitted the funds to the visa applicant using her own name.

29. *Assessment of the financial aspects of the parties' relationship*

30. It is apparent the review applicant's mother operates as his financial manager on an informal basis [information deleted]. The review applicant appeared comfortable with his mother performing this role and there was no indication it was a circumstance where he was being exploited by his mother.
31. On the basis of the aforementioned circumstances, there appears nothing untoward in funds remitted to the visa applicant from Australia being remitted in the name of the review applicant's mother, rather than in his direct name. Whilst there is no clear documentary evidence linking amounts withdrawn from the review applicant's CBA account and funds remitted to the visa applicant through Western Union, the Tribunal was satisfied the review applicant's mother was a credible witness, whose oral evidence during the hearing in relation to this and other issues could be relied on.
32. The Tribunal accepts the financial aspects of the parties' relationship reflect the circumstances where they reside in separate countries and have not to date had the opportunity to significantly merge their financial affairs. The Tribunal has not placed significant weight on this as it is by no means unique in circumstances where a person is applying for a Subclass 309 visa. Accordingly, the Tribunal has not drawn an adverse inference from the review applicant's evidence he and the visa applicant have no shared assets of any significance, nor joint liabilities or legal obligations to each other. The Tribunal accepts the visa applicant receives some financial support from the visa applicant, through transactions organised by his mother, which the visa applicant puts towards her regular living costs and costs associated with her visa application.

33. *The nature of the household*

34. The Tribunal is satisfied the parties have not to date established a shared household together. The Tribunal is satisfied the evidence demonstrates they have shared accommodation in Lebanon following their marriage and that there is a viable plan for them to reside together in the home of the review applicant's mother in Artarmon, NSW. The Tribunal is satisfied the aforementioned property is a four bedroom home which is the traditional family home of the review applicant's family where he and his mother currently reside.

35.

36. *Assessment of the nature of the parties' household arrangements*

37. As the visa applicant and review applicant have not as yet established a household together and do not have shared responsibility for the care of children, this aspect of their relationship does not clear support the contention they are in a genuine spousal relationship. However, given the circumstance identified elsewhere in this decision, namely that this is an application for a subclass 309 visa, where the parties at the moment reside in different countries, the Tribunal but has not drawn an adverse inference from this. Therefore, the Tribunal finds the nature of the parties' household arrangements do not either support or detract from the contention they have a mutual commitment to a shared life together in a genuine and continuing relationship.

38. *The social aspects of the relationship*

39. The Tribunal notes the visa applicant and review applicant are first cousins. The Tribunal is satisfied the evidence demonstrates the parties' relationship has the support of their extended family system. The Tribunal is also satisfied that within the context of their

extended family system the parties represent themselves as a married couple with an intention to live together in Australia. The Tribunal has placed some weight on the evidence of furniture purchased for the parties to fit out their bedroom in the home of the review applicant's mother as an indication of the families' acceptance of their relationship and future intentions. The Tribunal noted that a number of the review applicant's siblings, and their partners attended the hearing to support him and is satisfied this is a further reflection as to how the parties' relationship is supported by his family.

40. The review applicant's mother stressed that the parties' marriage was not arranged by other family members. She said she was somewhat taken aback when her son's interest in marrying the visa applicant became apparent only shortly after they spent some time together in 2014. The mother of the review applicant told the Tribunal that she is however fully supportive of the relationship. She gave, what the Tribunal considered sincere oral evidence that her other children have married and started their own families and that since her husband passed away and the breakdown of the review applicant's previous marriage, it is just her and the review applicant in the family home. She indicated she hopes the visa applicant and join the review applicant in Australia and that they have a family and bring some grandchildren back into the family home.
41. The Tribunal has reviewed the photographs provided with the review application and is satisfied they indicate members of the visa applicant's family were present at the parties' wedding celebrations in Lebanon and at some other gatherings where the parties were both present since that time, including during a more recent trip the review applicant made to Lebanon in 2017.
42. There is little evidence the parties have to date planned or undertaken many social activities together, however given the limited time they have actually spent with each other and their residing in different countries, the Tribunal has not placed any significant degree of adverse inference upon this.

43. *Assessment of the social aspects of the parties' relationship*

44. The social aspects of the parties' relationship are in the most part supportive of the contention they are in a genuine and continuing relationship. They have registered their marriage with the appropriate authorities in Lebanon and have the support of their extended family systems for their marriage and proposed future life together. In the context where both the visa and review applicants are not young people and come from a cultural background where family has a central role and marriages between first cousins is not as infrequent as it may be for people from other cultural backgrounds, the limited evidence the parties have socialised together outside of their family systems is not inherently indicative of their relationship not being genuine.

45. *The nature of the persons' commitment to each other*

46. The parties have provided consistent evidence their relationship began in 2014 at a time the review applicant and his mother were visiting relatives in Lebanon after the death of the review applicant's father. The review applicant gave evidence he had known of his cousin before this time but that they had not met as adults and that he asked her if she would consider marrying him within a few days of first interacting with her in 2014. The manner in which the review applicant discussed his attraction to the visa applicant and his wish for her to come to Australia and establish a life together with him appeared quite genuine. He said his first marriage failed and that he wanted to not be alone in the future. He said the visa applicant was in a situation in Lebanon where all her siblings were married and had families of their own and that as a single woman her life was becoming increasingly difficult. He said he thought it would be good if she married him, came to Australia and that they had some

children together. He said his three children from his first marriage live with their mother, but that he hopes they will accept his relationship with the visa applicant and cannot see why they would not do so. The review applicant discussed these issues during the hearing in an enthusiastic and somewhat concrete manner, which appeared indicative of his communication style and way of thinking about the world and his place in it. It did not seem at all disingenuous.

47. [Information removed]. The visa applicant gave an account of her life in Lebanon, as a single woman in her early forties which was broadly consistent with the review applicant's descriptions of her circumstances.
48. The review applicant provided extensive telephone and social media records with the review application. In the particular circumstances of this case, the Tribunal has placed only limited weight on this evidence, as phone records do not provide a clear indication of who may have initiated calls, nor as to the content of any discussion in those calls. It is also not clear who has made the social media posts that are documented in the evidence and the Tribunal is not sufficiently satisfied that all or most of them were made by the review applicant.
49. Assessment of the nature of the parties' commitment to each other
50. The parties have been married for over three years and during that period the review applicant has travelled to Lebanon twice to spend time with the visa applicant. The Tribunal is satisfied some weight can be accordingly given to the duration of the relationship. The Tribunal is also satisfied the parties display a level of understanding of each other's life circumstances that indicate they draw some emotional support and companionship from each other. They present with similar goals for their relationship and a plausible intention for a long term relationship.
51. ***Conclusion on spouse criterion***
52. In *Re MILGEA and Dhillon* [1990] FCA 144, the Federal Court stated "people enter marriages with a variety of purposes and motives, hopes and anticipations, so that it is not possible to classify some purposes etc. as according to what may be described as 'community expectations'. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others."
53. The Tribunal notes there is no evidence to suggest either of the parties are in a relationship with a third party. The Tribunal is aware the visa applicant may see a marriage to the review applicant as a way to improve her life circumstances through becoming a member of a couple and migrating to Australia. I do not see any such consideration would be fatal to the legitimacy of her visa application. There is limited evidence the parties have to date merged their finances and they have not had the opportunity to establish a household together. They do however have the support of their families for their relationship and they have a shared commitment to a life together in the home of the review applicant's mother. [Information removed]. Their proposed living arrangements, within a multi-generational household in the home of the review applicant's mother, who has an instrumental role in supporting her [son] is in the view of the Tribunal plausible and reasonable.
54. Consistent with *Dhillon*, the Tribunal considers that a relevant test in this matter is whether at the time at which the matter has to be decided, it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others. It is the

Tribunal's view that there is evidence that at the time of decision the parties do have such a commitment.

55. Having considered all of the factors as set out in r.1.15A(3) the Tribunal is satisfied that at the time of application and time of decision the applicants had a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. They therefore meet the requirements of s.5F(2)(b) and s.5F(2)(c) for a spouse relationship.
56. Therefore, the visa applicant meets cl.309.211 and cl.309.221.
57. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

58. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

David Barker
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).